REASONABLE USE OF PERCOLATING WATERS.—The law in England with regard to percolating waters has long been settled. In two leading cases, *Acton* v. *Blundell*[1] and *Chasemore* v. *Richards*,[2] it was decided that a land owner has an absolute right to the percolating waters which he can intercept in his land, and that he is consequently not liable to an adjoining proprietor, regardless of the quantity of water taken, or the purpose to which it is applied. Consistently with this principle of absolute rights, actual bad faith and malicious motive do not render such diversion actionable.[3] Three reasons for this rule are given: (1) The theory that the owner of the land is the absolute owner of all, either above or below the surface, (2) the fact that percolating waters are so uncertain in their movements that it would be impracticable to propound rules of law to govern their use, (3) the desire not to limit a land owner in the use and improvement of his property.[4] Influenced largely by the English authorities cited, the early American decisions applied the same doctrine:[5] no correlative rights in percolating waters were recognized, and consequently all damage suffered was "*damnum absque injuria.*"[6] But even in adopting the English rule, the courts in this country hesitated to extend immunity to interference arising out of malice;[7] and, although several jurisdictions disregarded motive,[8] the weight of authority held that diversion for the single purpose of harming a neighbor was actionable.[9] One jurisdiction, moreover, refusing to be guided by English authority, decided that the rights of adjoining land owners in percolating waters were not absolute, but correllative.[10]

In *Forbell* v. *City of New York*,[11] a case substantially identical with *Chasemore* v. *Richards*,[12] the defendant was held liable for the damage caused by exhausting, with powerful pumps, the water percolating through the plaintiff's land, and selling the water so obtained. Despite professed adherence to former holdings the court in this case virtually decided that a land owner's right is not absolute, but must be reasonably exercised. The court, however, went further and also formulated the test as to what constituted a reasonable user, holding the user reasonable when water obtained by artificial means was applied for the benefit of land as land, and not otherwise. The view often expressed that the rule of unreasonableness formulated in this case is mere user off the land seems too narrow, because it fails to recognize the employment of artificial means; and the opinion that the defendant's liability was based upon a quasi-trespass, effected

[1](1843) 12 Mees. & Wells. 324.

[2](1859) 7 H. L. Cas. 349.

[3]Mayor etc. of Bradford *v.* Pickles (1895) A. C. 587.

[4]Acton *v.* Blundell, *supra.*

[5]Ellis *v.* Duncan (N. Y. 1855) 21 Barb. 230; Bloodgood *v.* Ayers (1888) 108 N. Y. 401; Roath *v.* Driscoll (1850) 20 Conn. 533; Ocean Grove *v.* Asbury Park (1895) 40 N. J. Eq. 447; People's Gas Co. *v.* Tyner (1891) 131 Ind. 277.

[6]Frazier *v.* Brown (1861) 12 Oh. St. 294; Pixley *v.* Clark (1866) 35 N. Y. 520; Chatfield *v.* Wilson (1856) 28 Vt. 49; Wheelock *v.* Jacobs (1897) 70 Vt. 162.

[7]Greenleaf *v.* Francis (Mass. 1836) 18 Pick. 117.

[8]Chatfield *v.* Wilson, *supra;* Phelps *v.* Nowlen (1878) 72 N. Y. 39.

[9]Haldeman *v.* Bruckhardt (1863) 55 Pa. St. 514; Chesley *v.* King (1882) 74 Me. 164.

[10]Bassett *v.* Salisbury Mfg. Co. (1862) 43 N. H. 569; Swett *v.* Cutts (1870) 50 N. H. 439.

[11](1900) 164 N. Y. 522; and see Smith *v.* City of Brooklyn (N. Y. 1897) 18 App. Div. 340.

[12](1859) 7 H. L. Cas. 349.

through the apparatus used, is unsound in theory, as a trespass similar in kind is committed whenever a well is sunk, in which case no liability attaches.

The effect of this decision has been far reaching, and although not fully approved in several decisions,[13] and despite some continued adherence to the English rule,[14] the principle of correlative rights which it enunciated has been generally followed.[15] Most courts have not, however, gone as far as New York in adopting beneficiality to the soil as the test of the right, but have contented themselves with holding that the rights involved are correllative, that the user must be reasonable, and that the question of reasonableness is a question which must be decided in each individual case.[16] The reasoning of these American cases is cogent. Modern conditions often make percolating waters extremely valuable, the effect of the land owner's operations can be foretold with considerable certainty, and the applicability of the doctrine of "*cuius est solum* * * *" may well be questioned when the water obtained is coaxed from beneath the adjoining proprietor's soil. Furthermore, since acts done in the ordinary development and enjoyment of land are naturally recognized as reasonable, the practical objection urged in the early cases is of little weight, and the disadvantage ensuing from the substitution of an uncertain test for the orthodox hard and fast rule is more than outweighed by the practical justice secured by the recognition of correllative rights.

In a recent New York case, *Hathorn* v. *Natural Carbonic Gas Co.* (1909) 87 N. E. 504, the defendant was sued for pumping the mineral waters on his land at Saratoga Springs, the carbonic gas of which he extracted and sold. The court held, that, irrespective of the statute applicable, as the user was unreasonable under the *Forbell* test, the defendant was liable. The result reached seems open to question. Since the gas in solution was the real element of value, it would appear that the case might well have been treated under the rules governing natural gas; and although a few jurisdictions have recognized correllative rights therein,[17] the great majority does not restrict the land owner's right of production.[18] But, even if it be conceded that the mineral waters were rightly classified as percolating waters, it is not apparent how the New York rule of "beneficiality to the soil" was applicable. Mineral waters are of no value to the land as land, and their chief use is as articles of commerce. Certainly if a land owner is to be restricted to a reasonable user of mineral waters, the nature of the article as well as the conditions of its use should be considered in arriving at the correct test of reasonableness. It would appear, therefore, that the test of beneficiality to the soil is too narrow to include mineral waters, and the court would have reached a sound result if a broader meaning of reasonable use had been applied.

[13]Barclay *v.* Abraham (1903) 121 Ia. 619; H. & T. C. Ry. *v.* East (1904) 98 Tex. 146.

[14]Huber *v.* Merkel (1903) 117 Wis. 355; Edwards *v.* Haeger (1899) 180 Ill. 90; Miller *v.* Black Rock Co. (1901) 99 Va. 747; Clark County *v,* Lumber Co. (1902) 80 Miss. 535.

[15]Gagnon *v.* French Lick Springs Hotel Co. (1904) 163 Ind. 687; Katz *v.* Walkinshaw (1903) 141 Cal. 116; Erickson *v.* Crookston Water Works (1907) 100 Minn. 481.

[16]Barclay *v.* Abraham, *supra;* Pearce *v.* Carney (1905) 58 W. Va. 296.

[17]Manufacturer's Gas Co. *v.* Indiana Natural Gas. Co. (1900) 155 Ind. 461.

[18]Westmoreland Nat. Gas Co. *v.* DeWitt (1889) 130 Pa. 335; Hague *v.* Wheeler (1893) 157 Pa. 324; Jones *v.* Forest Oil Co. (1900) 194 Pa. 379; Kelly *v.* Ohio Oil Co. (1897) 57 Oh. St. 317; Ohio Oil Co. *v.* Indiana (1899) 177 U. S. 190.